AU YONG KUN MIN

v.

TRACTORS MALAYSIA BHD.

HIGH COURT MALAYA, MELAKA
AUGUSTINE PAUL JC
[CIVIL SUIT NO: 22-192 OF 1975]
17 MAY 1997

CIVIL PROCEDURE: *Striking out - Statement of claim - Rules of the High Court 1980, O. 18 r. 19 - Claim that plaintiff estopped from maintaining action - Reliance on principles of res judicata - Contention that plaintiff should have raised the issue in a counterclaim in the previous suit - Whether plea of res judicata applicable - Whether plaintiff barred from filing present suit - Federal Court giving opinion that previous suit and present suit connected - Effect of opinion on trial Court - Whether trial Court bound by opinion of Federal Court - Consideration of doctrine of stare decisis*

CIVIL PROCEDURE: *Res judicata - Application of - Previous suit heard on appeal by Federal Court - Federal Court agreeing there was connection between facts of previous suit and facts of present suit - Defendant relying on Federal Court decision to plead res judicata in present suit - Whether trial Judge bound by decision of Federal Court - Whether statement by Federal Court was part of ratio of the case or obiter - Consideration of the doctrine of stare decisis*

The defendants in the present suit had sued the plaintiff for the recovery of moneys due on the sale of three tractors and obtained judgment. The plaintiff's appeal to the Federal Court against the judgment was dismissed. The plaintiff's claim in the present suit arises from an alleged wrongful repossession of a tractor.

The defendants applied to strike off the present suit on the grounds that the plaintiff is estopped in maintaining the action in accordance with the principles of *res judicata*. The defendants argued that since the second suit is connected to the first suit it ought to have been brought as a counterclaim in the first suit. In support of their arguments the defendants relied on a statement by the Federal Court on the hearing of the appeal in the first suit that both the suits were connected.

Held:

[1] There were cogent and convincing reasons for holding that the two suits were not connected. Firstly, the present suit is a claim for wrongful repossession whereas the earlier suit was a claim for money owed. Secondly, when the first suit was filed on 16 July 1975, the cause of action in respect of the present suit had not arisen yet as the tractor was only repossessed on 11 October 1975 and thirdly, that the defendants themselves had admitted in their affidavit that both the suits involve different subject matters and do not depend on each other for their proper determination.

[2] The Court was not bound by the findings made by the Federal Court in relation to the connection between the two suits as they were not pronouncements on the law. It is only the principle upon which a question before the Court has been decided which is binding and the findings of the Federal Court relied on by the defendants did not fall within that category.

[Application dismissed with costs.]

Cases referred to:

Selva Kumar v. Thangarajah [1995] 2 CLJ 375 ***(refd)***

Tractors Malaysia Bhd. v. Kumpulan Pembinaan Malaysia Sdn. Bhd. [1979] 1 MLJ 129 ***(refd)***

Stoneleigh Finance Ltd. v. Phillips & Ors. [1965] 1 All ER 513 ***(refd)***

Re Watson, Ex parte Official Receiver in Bankruptcy [1890] 25 QBD 27 ***(refd)***

Tan Chong & Sons Motor Co. (Sdn.) Bhd. v. Alan McKnight [1983] 1 MLJ 225 ***(refd)***

Hindustan Malleables Forgings Ltd. v. Indian Furnace Co. Ltd. AIR [1979] Pat 146 ***(refd)***

Baij Nath v. Nand Ram AIR [1926] Pat 353 ***(refd)***

Kamala Sugar Mills Ltd., Delhi v. Gang Bison Bahaman Singh AIR [1978] Mad 178 ***(refd)***

Tarling v. Baxter [1827] 6 B & C 360 ***(refd)***

Harper Gilfillan (1980) Sdn. Bhd. v. Kean Toh Amang Factory Sdn. Bhd. & Lee Kwee Hong (Claimant) [1986] 1 MLJ 249 ***(refd)***

Martindal v. Smith [1841] 1 QB 389 ***(refd)***

Aluminium Industrie Vaassen BV v. Romalpha Aluminium Ltd. [1976] 1 WLR 676 ***(refd)***

Stockloser v. Johnson [1954] 1 QB 476 ***(refd)***

Elson v. Prices Taylor Ltd. [1963] 1 WLR 287 ***(refd)***

Hyundai Heavy Industries Co. Ltd. v. Papadopoulos [1980] 1 WLR 1129 ***(refd)***

Jagatheesan v. Linggi Plantations Ltd. [1969] 2 MLJ 253 ***(refd)***

Chen Chow Lak v. Tan Yew Lai [1983] 1 MLJ 170 ***(refd)***

K Umar Kandha Rajah v. El Magness [1985] 1 MLJ 116 ***(refd)***

Amies v. Jal AIR [1924] B 41 ***(refd)***

M Mohd Sharif & KA Palaniswami & Co. Tripur v. Official Liquidator AIR [1964] Ker 135 ***(refd)***

Popular Industries Ltd. v. Eastern Garment Manufacturing Sdn. Bhd. [1989] 3 MLJ 360 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 92
Sale of Goods Act 1957, ss. 1(2), 2, 4, 19, 20, 25(1), 55(1)
Civil Law Act 1956, s. 5(2)
Sale of Goods Act 1893 [UK], ss. 1, 17(1), (2), 18 r. 1, 62(1), (4)

Other sources referred to:
Chalmer's Sale of Goods, 17th Edn., p. 84
Pollock & Mulla, 4th Edn., p. 35
Benjamin's Sale of Goods, 4th Edn., para. 15-114

For the plaintiff - Melvin Selvam; M/s. Jagjit Singh & Co.
For the defendant - C.C. Aiyadurai (Lawrence Lau with him); M/s. Thakurta Low & Rajendra

JUDGMENT

Augustine Paul JC:

The plaintiff and the defendants entered into an agreement on 20 September 1974 ('the agreement') for the hire of a 1969 model Caterpillar D8H Tractor ('the tractor') for three months at a rent of RM36,000 per month. As the plaintiff failed to make some of the payments the defendants repossessed the tractor. The issue for determination is whether the repossession was lawful.

The material parts of the agreement read as follows:

> **THE EQUIPMENT**
>
> ONE UNIT USED CATERPILLAR D8H TRACTOR, SERIAL NO. 68A1566 C/W ANGLEDOZEN BLADE.
>
> CLASSIFICATION:- SERVICED.
>
> Terms of Rental
>
> 1. The equipment shall at all times during the continuance of this Agreement remain the property of the owner and will be rented to the hirer for 3 (THREE) months on payment being effected as follows:

Date	Amount
29.9.74	RM36,000
29.10.74	RM36,000
29.11.74	RM36,000

2. The residual value as at 29th December 1974 will be RM36,000.

3. Default in payment or any of the above rental amounts on the due dates or failure by the hirer, in the opinion of the owner, to observe any of the conditions of this Agreement will nullify the Agreement and the owner is entitled to take possession of the equipment without prior notice and without the hindrance of the hirer.

4. The owner is entitled to take whatever course of action is necessary to recover amounts due from the hirer.

Conditions of Rental

1. The hirer will at his own expense at all times during the course of this Agreement, comprehensively insure with an Insurance Company approved by the owner and show in such insurance policy the interest of the owner.

2. The Hirer will be responsible for transportation of the equipment to and from the owner's premises and shall reimburse the owner any such expenses so incurred by the owner in carrying out this service at the conclusion of the hire period. The hirer shall at all times advise the owner of the location of the equipment under hire and shall not use the equipment for purposes other than those advised to the owner.

3. The hirer will be responsible for the supply of competent operators, fuel and lubricants and for the carrying out of engine oil changes and filter changes every 250 hours.

4. The equipment shall remain the property of the owner and nothing contained in this Agreement shall confer or be deemed to confer any interest in the equipment to the hirer.

5. No liability shall be attached to the owner either in contract or in tort for loss injury or damage sustained by reason of any defect in the equipment whether such defect be latent or apparent on examination.

6. The hirer will be responsible for the repair of all damage caused by accident or misuse and all normal operating repairs and maintenance and will only use manufacturer's genuine spare parts. Normal warranty will be available where applicable. On conclusion of this Agreement and return of the equipment to the owner, the Hirer shall be responsible to the owner for any repair charges incurred by the owner which in the opinion of the

> owner are necessary, due to accident or misuse of the equipment by the hirer or for any expenses arising other than caused by normal wear and tear of the equipment

The plaintiff (PW1) said that the agreement, though signed as a rental agreement, should have been a sale and purchase agreement. He said that he bought the tractor from the defendants for RM144,000 to be paid in four monthly instalments of RM36,000 each and was asked to sign the agreement in respect of it. He made the first payment of RM36,000 by cheque. He gave another three post-dated cheques for RM36,000 each. The tractor was delivered to him on 28 September 1974. The delivery note is at p. 3 of the Agreed Bundle of Documents ('Exh. B'). Page 5 of Exh. B contains the invoice. It describes the tractor and specifies its price as RM144,000. After PW1's first cheque was cashed he ran short of funds. He then negotiated with the defendants to trade-in one of his used tractors to make up the amount due to them. He confirmed the arrangement by a letter to the defendants dated 15 November 1974 which is at p. 8 of Exh. B and the material parts of it read as follows:

> Reference my discussion with you that I cannot find sufficient money to pay for the DS bulldozer I bought from you last month and as agreed with you I hereby trade in my D6C for the sum of RM55,500.
>
> Therefore I now owe you as follows:
>
> | | |
> |---|---|
> | Purchase price of DS | RM 144,000 |
> | Less D6C trade-in | 55,500 |
> | Nett | RM 88,500 |
> | Less sum already paid | 36,000 |
> | Balance to be paid | RM 52,500 |
>
> I will pay the balance by:
>
> (a) RM12,500 end of November.
>
> (b) RM20,000 end of December.
>
> (c) RM20,000 end of January.

This letter refers to the tractor as the one that PW1 "... bought ... " and clearly refers to the payment due as being part of the purchase price. The defendants, reply dated 27 November 1974 is at p. 6 of Exh. B the materials of which read as follows:

Re: One Unit Used Cat. D6C Tractor, Serial No. 82A256.

We offer to trade-in your above unit of used Caterpillar D6C tractor, Serial No: 82A256 @ RM55,500 (Dlrs. Fifty Five Thousand & Five Hundred Only) against the purchase of one unit used Cat. D8H tractor, Serial No: 68A1566 and the full traded-in amount will be towards the down-payment of the Cat. D8H tractor.

THE TRADE-IN AMOUNT is RM55,500

Kindly sign on the space provided below to signify your acceptance.

Yours faithfully,

For TRACTORS MALAYSIA BERHAD
I accept your above offer,

Sgd. Illegible.

KHUNG THYE HIONG ...
AREA MANAGER (SOUTH) (Mr. AU YONG KUN MIN)

In this letter the defendants refer to the "... purchase ..." of the tractor and do not dispute the contents of the plaintiff's letter reproduced earlier. Thus as of 27 November 1974 PW1 had paid RM36,000 and traded in a tractor for RM55,500 in respect of the agreement. The balance due, to the defendants was RM52,500. With regard to this sum he issued three post-dated cheques to the defendants as follows:

First Cheque RM12,500

Second Cheque RM20,000

Third Cheque RM20,000

The first cheque was cleared but not the other two. By letter dated 20 March 1975 (see p. 17 of Exh. B) the defendants demanded the sum of RM40,000 due. PW1 then negotiated with the defendants again who agreed to accept the balance of RM40,000 by four payments of RM10,000 each. The plaintiff accordingly issued four post-dated cheques to the defendants by letter dated 27 March 1975 (see p. 18 of Exh. B). The first cheque for RM10,000 was honoured while the remaining three were not. PW1 then made a payment of RM5,000 leaving a balance of RM25,000 due to the defendants. The balance due is an agreed fact by the parties. The letter of demand dated 27 June 1975 (at p. 30 of Exh. B) for the sum of RM25,000 reads as follows:

Re:- CAT. D8H SERIAL No: 68A1566

Your payments for this unit are very unsatisfactory and we will be taking legal action on this matter.

1. Your rentals of RM20,000 end of Dec., 1974 & RM20,000 end of Jan., 1975 have not been cleared up to now.

2. Your letter of 12th March suggested (by you) to settle:

RM10,000 in April,

RM10,000 in May,

RM10,000 in June,

RM10,000 in July

This is already bad enough then,

3. Your RM10,000 for May bounced and another RM10,000 for June also bounced (a RM5,000 cheque was cleared in June).

The way it is dragging on, you will have one year's interest free ride on RM40,000.

Please give us a cheque for RM25,000 before the end of July (Your promise of 12/3/75), otherwise, we will commence legal proceedings immediately. Please treat this seriously.

Then on 11 October 1975 the defendants repossessed the tractor without any notice to PW1. In support of his contention PW1 referred to pp. 31-33 of Exh. B which contained two quotations for rental of a Caterpillar D8H Tractor the material parts of which read as follows:

First Quotation

One unit used Caterpillar D8H Powershift Tractors, Serial No. 68A2715 complete with 'S' Blade and canopy top.

Rental Price	RM7,500 per month
Rental Term:	At least for six (6) months
Option to Purchase Price	RM170,000

Second Quotation

Rental of Caterpillar D8H Bulldozer.
We refer to your enquiry for the rental of a Caterpillar D8H bulldozer and would advise that we have one in stock available for hire on the following terms and condition:

Description of machine:
Caterpillar D8H bulldozer, year model 1969 Serial no. 68A1830 in good working order having recently been reconditioned. Bulldozer is 270 HP powershift and fitted with an angle or straight blade as you prefer.
Rental rate:
RM8,500 per month excluding repairs, diesel fuel, maintenance, operator's wages etc,
Minimum period of rental entertained – is 3 months
Terms of payment: One month's deposit (refundable on return of machine) and one month's rent in advance. All monthly rents are payable in advance.

Time availability of offer: This offer is good for up to 7 days hereof but we would advise early confirmation in order to avoid disappointments.

In cross-examination PW1 said that the agreement was the only one that he had signed with the defendants. He said that the only change in the agreement was the mode of payment on the different occasions and that the other parts of the agreement remained.

The defendants' representative (DW1) testified that the tractor was repaired at a cost of RM46,436 after it was repossessed. If it had not been repaired it would have had a life-span of only six months. In cross-examination he said that he does not agree that the agreement is a sale agreement signed as a rental agreement. He said that he did not know whether the residual value is the last value or rental. He said that he does not agree that the words "sold to" in the invoice mean that the tractor was sold to the plaintiff. When he was referred to the quotations which I have reproduced earlier he agreed that the sum of RM36,000 as rental is excessive.

In substance the submission of learned Counsel for the defendants is that the parties had signed a rental agreement. He said that whether the agreement was a rental or sale agreement the property in the tractor did not pass to the plaintiff with the result that the defendants were authorised to repossess the tractor. Thus, he concluded, the plaintiff cannot maintain an action for wrongful possession of the tractor. In his submission learned Counsel for the plaintiff contended that the agreement was an outright sale disguised as a rental agreement. He said that the repossession was therefore unlawful and unconscionable and referred to cases such as *Selva Kumar v. Thangarajah* [1995] 1 MLJ 817 and *Zubaidah v. Zulkathar* [1963] MLJ 63. He then said that the defendants should have sued the plaintiff for the balance of the purchase price of RM25,000 and not repossess the tractor as the plaintiff had paid a sum of RM119,000 out of the total purchase price of RM144,000. He concluded by saying that as the agreement had expired the defendants could not act upon it. Thus the legality of the repossession would depend on whether the property in the tractor had passed to the plaintiff pursuant to the agreement

entered into between them. This is critical because if the property had passed to the plaintiff then the defendants have no right to repossess the tractor (see *Tractors Malaysia Bhd. v. Kumpulan Pembinaan Malaysia Sdn. Bhd.* [1979] 1 MLJ 129). In that event the repossession of the tractor would be unlawful.

I shall first consider the nature of the agreement. The Court of Appeal held in *Stoneleigh Finance Ltd. v. Phillips & Ors.* [1965] 1 All ER 513 that no authority is needed for the proposition that it is the duty of the Court to look behind the form of any transaction under consideration and to ascertain its real substance. Thus in *Re Watson, Ex parte Official Receiver in Bankruptcy* [1890] 25 QBD 27 it was held that the transaction was not a sale, which it purported to be, but a loan secured on chattels which remained in the possession of the borrower. In the matter before me the agreement states that the tractor is to be rented out to the plaintiff for three months at a rental of RM36,000 per month. The two quotations which I have reproduced earlier shows the rent for a similar type of tractor which is far below the amount specified as rent in this case. Even DW1 conceded that the sum of $36,000 as rental for the tractor is excessive. The invoice issued by the defendants to the plaintiff describes the tractor as being "sold to" indicating that the transaction was a sale. The letters at pp. 6 and 8 of Exh. B which I have reproduced earlier also describes the transaction as a sale. The fact that the claim by the defendants is only for the balance due under the agreement as originally agreed even though the use of the tractor by the plaintiff has gone beyond the specified period without any additional claim for rent militates against the arrangement being termed as a rental agreement. In the letter dated 27 June 1975 the same balance due is stated as rental for the extended period. This is obviously for the purpose of giving the transaction the same description as originally given. In the circumstances it is my view that the arrangement between the parties was for the sale of the tractor at a price of RM144,000 payable in four instalments of RM36,000 each. I interpolate to add that the prohibition contained in s. 92 of the Evidence Act 1950 against the reception of the oral evidence of PW1 does not apply as the agreement does not contain all the terms of the contract (see *Tan Chong & Sons Motor Co. (Sdn.) Bhd. v. Alan McKnight* [1983] 1 MLJ 225).

The resultant matter for determination is whether the arrangement is a contract of sale or an agreement to sell. The distinction between them is governed by the Sale of Goods Act 1957 ('the 1957 Act') which is concerned with the law relating to the sale of goods. However s. 1(2) of the 1957 Act as it then stood rendered it inapplicable to Malacca and Penang. The application of the 1957 Act was extended to the two states by the Sale of Goods (Amendment and Extension Act) Act 1990 with effect from 23 February 1990. As the agreement in this case was entered into in Malacca before that date the 1957

Act would have been inapplicable. With regard to the two states the applicable law prior to 23 February 1990 shall be the relevant English law pursuant to s. 5(2) of the Civil Law Act 1956 (see *Tan Chong & Sons Motor Co. (Sdn.) Bhd. v. Alan McKnight* [1983] 1 MLJ 225). As the agreement in this case was entered into in 1974 the relevant English Law is the Sale of Goods Act 1893 [UK] ('the 1893 Act') and not its 1979 successor.

The provisions of the 1957 Act and the 1893 Act are generally in *pari materia* with each other.

Section 1 of the 1893 Act (equivalent to s. 4 of the 1957 Act) governs the distinction between a contract of sale and an agreement to sell. It reads as follows:

> 1(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract for sale between one part-owner and another.
>
> (2) A contract of sale may be absolute or conditional.
>
> (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.
>
> (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Thus a contract of sale is termed a sale when the property in the goods is transferred from the seller to the buyer and an agreement to sell when the transfer of the property in the goods is to take place at a future time or subject to fulfillment of some conditions. When these events happen the agreement to sell becomes a sale.

The time at which the property in the goods sold passes from the seller to the buyer is laid down in s. 17 of the 1893 Act (equivalent to s. 19 of the 1957 Act) which reads as follows:

> 17(1) When there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred
>
> (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

According to s. 17, therefore, the property in specific or ascertained goods is transferred to the buyer at such time as the parties intend. The question as to when the parties intended the property in the goods to be transferred is essentially one of fact subject only to the rules of presumption for the ascertainment of intention as indicated in, *inter alia,* s. 18. As provided by s. 17(2) the matters that the Court shall have regard to in ascertaining the intention are:

a) the terms of the contract;

b) the conduct of the parties; and

c) the circumstances of the case

It is open to the parties to fix the time when the property in the goods is to pass to the buyer. When there is no specific provision in the contract about the passing of the property from the seller to the buyer an inference has to be drawn from the conduct of the parties (see *Hindustan Malleables Forgings Ltd. v. Indian Furnace Co. Ltd.* AIR [1979] Pat 146; *Baij Nath v. Nand Ram* AIR [1926] Pat 353). In *Kamala Sugar Mills Ltd., Delhi v. Gang Bison Bahaman Singh* AIR [1978] Mad 178 cl. 1 of the contract between the plaintiff and the defendants provided that a railway receipt was deliverable against cash or documents negotiated through a bank, though the other terms had provided that the goods would be dispatched at the buyer's risk and that the defendants were not responsible for any loss or damage after the goods had left their promises, it was held that the goods had passed even prior to the railway receipt having been honoured by payment either in cash or through the agency of the bank. The very fact that the defendants had made it clear in their letter that all the goods had been appropriated and were ready for despatch and which fact the plaintiff took for granted had raised the usual presumption that the defendants had appropriated the goods unconditionally to the contract and that they were in a deliverable state and the only thing that remained in order to perform the contract was to put them in a wagon for their onward transport.

Where a contract of sale is conditional there is no transfer of the property to the buyer till the conditions are satisfied. An unconditional sale is a sale pure and simple, transferring the property absolutely to the buyer. A conditional sale is a sale subject to some conditions. Section 18 r. 1 of the 1893 Act (equivalent to s. 20 of the 1957 Act) deals with the transfer of the property where the sale is unconditional. It reads as follows:

18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1

> Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price, or the time of delivering of the goods, or both, is postponed.

Under this section the property in the goods passes to the buyer when the contract is made even if the time of payment of the price, or the time of delivery of the goods, or both, is postponed subject to fulfillment of the following conditions:

(a) The contract of sale must be unconditional

With regard to the meaning of the phrase "unconditional contract" Siti Norma Yaakob J (as she then was) said in *Ng Nat Siang v. Arab-Malaysian Finance Bhd. & Anor.* [1988] 3 MLJ at p. 321:

> In *Benjamin's Sale of Goods,* unconditional contracts have been defined to mean 'not subject to any condition suspensive of the passing of the property'

(b) The contract must relate to specific goods.

Section 62(1) of the 1893 Act defines "specific goods" as goods identified and agreed upon at the time a contract of sale is made. The same definition appears in s. 2 of the 1957 Act.

(c) The goods must be in a deliverable state.

Section 62(4) of the 1893 Act states that goods are said to be in a "deliverable state" when they are in such state that the buyer would under the contract be bound to take delivery of them. The same definition appears in s. 2 of the 1957 Act.

The section is based on *Tarling v. Baxter* [1827] 6 B & C 360 where there was a sale on 4 January of a haystack on the seller's land at the price of £145 to be paid on 4 February. The hay was to be allowed to remain on the seller's land until 1 May. No hay was to be cut until the price was paid. It was held that the property in the haystack passed on the making of the contract and on the stack being destroyed by fire the buyer must bear the loss.

Even when the goods had been delivered to the buyer the property in the goods does not pass when certain conditions remain unfulfilled. This a provided by s. 19(1) of the 1893 Act (equivalent to s. 25(1) of the 1957 Act) which reads as follows:

> 19(1) When there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfiled.

The difference between a sale and an agreement to sell is significant in determining the remedies available to the parties when there is a breach. As George J (as he then was) said in *Harper Gilfillan (1980) Sdn. Bhd. v. Kean Toh Amang Factory Sdn. Bhd. & Lee Kwee Hong (Claimant)* [1986] 1 MLJ 249 at pp. 251-252 in reading from *Chalmer's Sale of Goods* (17th Edn.) at p. 84:

> The term 'contract of sale' thus includes both actual sale and agreements for sale. It is important to distinguish clearly between the two classes of contract. An agreement to sell, or, as it is often called, an executory contract of sale, is a contract pure and simple; whereas a sale, or, as it is called for distinction, an executed contract of sale, is a contract plus a conveyance. By an agreement to sell a *jus in personam* is created, by a sale a *jus in rem* also is transferred. Where goods have been sold (even though not delivered), and the buyer makes default, the seller may sue for the contract price on the count of goods bargained and sold, but where an agreement to buy is broken, the seller's normal remedy is an action for unliquidated damages. If an agreement to sell be broken by the seller, the buyer has only a personal remedy against the seller. The goods are still the property of the seller, and he can dispose of them as he likes; they may be taken in execution for his debts, and, if he becomes a bankrupt, they pass to his trustee ...

His Lordship also referred to p. 35 of *Pollock & Mulla* (4th Edn.):

> An agreement to sell, which is also called an executory contract of sale, is a contract simply, and creates only a *jus in personam*; the property in the goods which form the subject matter of the contract remains in the seller, so that they may be taken in execution for his debts, and belong on his bankruptcy to his trustee in bankruptcy ...

Thus the remedy available to the defendant upon breach of the agreement by the plaintiff would depend on whether the property in the tractor had passed to the plaintiff under the arrangement. Where the property has passed to the buyer the seller's sole remedy is by personal action. This is provided by s. 49(1) of the 1893 Act (equivalent to s. 55(1) of the 1957 Act) which reads as follows:

> 49(1) Where, under a contract of sale, the property in the goods passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods accordingly to the terms of the contract, the seller may maintain an action against him for the price of the goods.

Lord Denman CJ explained the position in *Martindal v. Smith* [1841] 1 QB 389 at p. 395 in this way:

> Having taken time to consider our judgment, owing to the doubt excited by a most ingenious argument whether the vendor had not a right to treat the sale as at an end, and reinvest the property in himself by reason of the vendee's failure to pay the price at the appointed time, we are clearly of opinion that he had no such right, and that the action (trover) is well brought against him. For the sale of a specific chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a lien upon the goods if they remain in his possession till that price be paid.

The 1893 Act (and the 1957 Act) provides remedies for an unpaid seller when he is in possession of the goods. A matter of concern is the remedy available to a seller upon breach by a buyer when possession is with the latter and the property in the goods is retained by the former. *Benjamin's Sale of Goods* 4th Edn. poses this question at para. 15-114:

> If the seller is entitled to terminate the contract on account of the buyer's repudiation or breach, can he retake the goods or is he entitled to claim the immediate return of possession?

And answered it in this way:

> In two cases where the goods had been delivered to the buyer but the property in them remained with the unpaid seller, it was held that that a seizure of them by the seller operated as a 'rescission' or termination of the contract and that this applied even where the seizure was made under an express power in the contract to do so upon the buyer's default (*Hewison v. Ricketts* [1894] 63 LJQB 711; *Att Gen v. Pritchard* [1928] 97 LJKB 561).

And at footnote no 86 to para. 15-112 it is stated that

> As owner the unpaid seller may, of course, keep the goods for his own use instead of reselling.

The right of the seller to retake possession of the goods can also be achieved by the insertion of a *Romalpa* clause in the contract following the decision of the Court of Appeal in *Aluminium Industrie Vaassen BV v. Romalpha Aluminium Ltd.* [1976] 1 WLR 676. It is settled law that instalments already paid may be recovered by a defaulting purchaser when the vendor elects to

discharge the contract. The circumstances in which this remedy is available are neatly summarised by Denning LJ in *Stockloser v. Johnson* [1954] 1 QB 476 at pp. 489-490.

> It seems to me that the cases show the law to be this: (1) **When there is no forfeiture clause**. If money is handed over in part payment of the purchase price, and then the buyer makes default as to the balance, then, so long as the seller keeps the contract open and available for performance, the buyer cannot recover the money; but once the seller rescinds the contract or treats it as at an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law subject to a cross-claim by the seller for damages: see *Palmer v. Temple* [1839] Ad & Ed 508; *Mayson v. Clouet* [1924] AC 980; *Dies v. British and International Co.* [1939] 1 KB 724; *Williams on Vendor and Purchaser*, 4th Edn., p. 1006. (2) **But when there is a forfeiture clause or the money is expressly paid as a deposit (which a equivalent to a forfeiture clause)**, then the buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the Court thinks fit. That is, I think, shown clearly by the decision of the Privy Council in *Steedman v. Drinkle* [1916] 1 AC 275 where the Board consisted of a strong three, Viscount Haldane, Lord Parker and Lord Sumner.
>
> The difficulty is to know what are the circumstances which give rise to this equity, but I must say that I agree with all that Somervell LJ has said about it, differing herein form the view of Romer LJ. Two things are necessary: first, the forfeiture clause must be of a penal nature, in this sense, that the sum forfeited must be out of all proportion to the damages, and, secondly, it must be unconscionable for the seller to remain the money.

See also *Elson v. Prices Taylor Ltd.* [1963] 1 WLR 287; *Hyundai Heavy Industries Co. Ltd. v. Papadopoulos* [1980] 1 WLR 1129; *Jagatheesan v. Linggi Platations Ltd.* [1969] 2 MLJ 253; *Chen Chow Lak v. Tan Yew Lai* [1983] 1 MLJ 170; *K Umar Kandha Rajah v. EI Magness* [1985] 1 MLJ 116. In my opinion any refund of instalments paid must take into account the depreciated value of the goods sold with an appropriate deduction for their use by the buyers.

Under the agreement the defendants retained ownership of the tractor after having parted with possession of it and a right to take possession of it if there was any default in payment of any of the sums due. The amount payable as rental is in respect of the full purchase price. The correspondence exchanged between the parties which I have reproduced earlier shows that the defendants intended to sell the tractor to the plaintiff. As the transfer of the tractor would take place only at a future time when all the payments had been made the

contract is an agreement to sell and the agreement will become a sale when the condition is fulfilled as laid down in s. 1 of the 1893 Act. Pursuant to s. 18 of the 1893 Act the property in the tractor did not pass to the plaintiff even though the agreement related to specific goods in a deliverable state. In the light of the default by the plaintiff to settle the balance sum of RM25,000 the condition remains unfulfilled and as provided by s. 19(1) of the 1893 Act the property in the tractor does not pass to the plaintiff even though it has been delivered to him. In *Amies v. Jal* AIR [1924] B 41 an agreement for the sale of a motor car, of which the price was paid in monthly instalments, contained among others a term that in default of payment of any one instalment the seller should be at liberty to terminate the agreement and take possession of the car without being liable to refund to the buyer the instalment paid by him. It was held that the intention of the parties, as expressed in the conditions, was that the property in the car should not pass until the full price was paid. In *M Mohd Sharif & KA Palaniswami & Co. Tripur v. Official Liquidator* AIR [1964] Ker 135 it was held that a railway receipt in the name of the consignee with a condition that the said receipt would be released only on payment of 65% of the price would make the case of property not passing until payment of the 65% is made. In *Tractors Malaysia Bhd. v. Kumpulan Pembinaan Malaysia Sdn. Bhd.* [1979] 1 MLJ 129 where payment for a second-hand Caterpillar tractor was in the form of hire purchase payments it was held that on a proper and correct construction of the agreement the intention between them was that the property in the vehicle was not to pass to the buyer until full payment had been made. Since the agreement to sell has been breached the repossession by the plaintiff is lawful as the property in the tractor has not passed and is in accordance with the terms of the agreement. It follows that the claim by the plaintiff based on wrongful repossession must fail. Even if it can be argued that the agreement is a rental transaction the repossession by the defendants is lawful as it was done as authorised by the agreement and as the ownership of the tractor was still with the defendants. With regard to the plaintiff's submission that the repossession was unconscionable I am unable to consider this issue as it has not been pleaded. The plaintiff has also not made any claim for a refund of the instalments paid for my consideration. His submission that the defendants could not act upon the agreement as it had expired is without merit. The defendants' remedy will only arise at that stage and, in any event, the mode of payment had been varied and extended by mutual consent.

I conclude with the opinion that even if I were to hold that the repossession of the tractor was unlawful the plaintiff has not adduced sufficient evidence to support his claim for damages. In this regard he said in his evidence:

> As a result of the repossession I could not carry on with my jungle clearing work. I had been incurring losses at the rate of RM1450 per day. This is because a tractor can fell 5 acres of jungle per day. At the rate of RM290 per acre it comes to RM1450 per day.

While cross-examined on this part of his evidence he said:

> Kumpulan Pembinaan offered me a contract of RM290 per acre. I claim RM290 x 5 acres = RM1450. The cost of hiring a tractor, manpower, SOCSO, EPF, fuel, maintenance has to be taken into account. These have not been taken into account for the RM1450.

Thus there is no evidence on the actual loss suffered by the plaintiff with the result that it is virtually impossible to assess the damages. In this regard I refer to *Popular Industries Ltd. v. Eastern Garment Manufactoring Sdn. Bhd.* [1989] 3 MLJ 360 where Edgar Joseph Jr J (as he then was) said at p. 369:

> In all the circumstances, reason and justice point to the inevitable conclusion that although the plaintiffs had shown the fact of damage, no evidence or no sufficient evidence has been adduced as to its amount with the perhaps unfortunate result that it is virtually impossible to assess damages (see *Dixon v. Deveridge* [1825] 2 C & P 109; 172 ER 50 and *Twyman v. Knowles* [138 ER 1183).

In this context, I am reminded of Lord Goddard's dictum in *Bonham-Carter v. Hyde Part Hotel* [1948] WN 89 quoted with approved by Thomson CJ in *Lee Sau Kong v. Leow Cheng Chiang* [1961] MLJ 17, namely, that:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, throw them at the head of the Court, saying, 'This is what I have lost, I ask you to give me these damages.' They have to prove it.

In the upshot I dismiss the plaintiff's claim with costs.

Reported by Satish Nair